3-16-1976

Lycoming Shoe Company v. Florence Irene Creech; Special Fund, Department of Labor, Commonwealth of Kentucky; and Kentucky Workmen's Compensation Board

Appellee's Brief 1975-SC-1178

APPELLEE'S BRIEF

SUPREME COURT OF KENTUCKY

FILE No. 75-1178

LYCOMING SHOE COMPANY .....APPELLANT

VS:

FLORENCE IRENE CREECH; SPECIAL FUND, DEPARTMENT OF LABOR, COMMONWEALTH OF KENTUCKY, WORKMEN'S COMPENSATION BOARD .....APPELLEES

APPEAL FROM LEE CIRCUIT COURT
HON. EARL F. ASHCRAFT, PRESIDING

BRIEF FOR APPELLEE, SPECIAL FUND

RONALD C. BAKUS
Assistant Counsel
Department of Labor
310 Legal Arts Building
200 South Seventh Street
Louisville, Kentucky 40202

KENNETH E. HOLLIS
GENERAL COUNSEL
Department of Labor
Frankfort, Kentucky 40601

This is to certify that pursuant to RCA 1.250 a copy of the within Brief has been served by mail on the Honorable Kendall Robinson, P.O. Box 34, Booneville, Kentucky 41314; Honorable James S. Carroll, 504 Court Square Building, Lexington, Kentucky 40507; the Honorable William L. Huffman, Director, Workmen's Compensation Board, Frankfort, Kentucky 40601; and upon Trial Judge, Honorable Earl F. Ashcraft, Irvine, Kentucky, 40336, on this 15th day of March, 1976.

COUNSEL FOR APPELLEE

TABLE OF CONTENTS AND AUTHORITIES

TABLE OF CONTENTS AND AUTHORITIES (Continued)

COUNTER STATEMENT OF THE QUESTIONS PRESENTED

WAS THE OPINION AND AWARD OF THE WORKMEN'S COMPENSATION BOARD OF JULY 28, 1975 AND THE FINAL JUDGMENT OF THE LEE CIRCUIT COURT OF OCTOBER 21, 1975, AFFIRMING THE BOARD'S FINDING THAT FLORENCE IRENE CREECH BECAME 100% OCCUPATIONALLY DISABLED SOLELY DUE TO INJURY FULLY SUBSTANTIATED BY THE EVIDENCE OF RECORD AND IN ACCORDANCE WITH THE STATUTORY AND RULING CASE LAW OF KENTUCKY?

JAMES R. YOCOM, SPECIAL FUND, ANSWERS THIS QUESTION IN THE AFFIRMATIVE.

SUPREME COURT OF KENTUCKY

FILE No. 75-1178

LYCOMING SHOE COMPANY .....APPELLANT

VS:

FLORENCE IRENE CREECH; SPECIAL FUND, DEPARTMENT OF LABOR, COMMONWEALTH OF KENTUCKY. WORKMEN'S COMPENSATION BOARD .....APPELLEES

APPEAL FROM LEE CIRCUIT COURT
HON. EARL F. ASHCRAFT, PRESIDING

BRIEF FOR APPELLEE, SPECIAL FUND

MAY IT PLEASE THE COURT:

COUNTER STATEMENT OF THE CASE

(A) Statement of Nature of This Proceeding

The Statement of the Nature of this Proceeding as stated in the appellant's brief is correct and the appellee Special Fund, agrees with same. The parties of this appeal will be designated as stated in appellant's brief.

(B) Statement of Facts

Florence Irene Creech received a work-related back injury on November 6, 1973, while using a machine on shoes the employer makes (OR p. 24, QQ. 20-22, p. 25).

At the hearing held herein (OR p. 22) on August 23, 1974, the employer made the following stipulation:

> "It is agreed and stipulated by and between the parties hereto that on and prior to November 6, 1973, both the plaintiff and defendant (employer) had elected to and were operating under the terms and provisions of the Workmen's Compensation Act of the Commonwealth of Kentucky; that on said date the plaintiff received an injury by accident which arose out of and in the course of her employment with said defendant company; that the defendant had due and timely notice of said accidential injury to plaintiff and that the plaintiff's average weekly wage was $130.17 per week, leaving only for the determination of the Board the length or extent and duration of said accidental injury."

The Opinion and Award of the Workmen's Compensation Board (OR pp. 263-264) and the final judgment of the Lee Circuit Court (TR p. 14) affirming the Opinion and Award determined that the employer did not show good reason why he should be relieved of said stipulation at the briefing stage of the case and that plaintiff had relied on it.

The Workmen's Compensation Board found the extent of disability suffered from the injury of November 6, 1973 to be 100% occupational disability (OR p. 268). The Workmen's Compensation Board exonerated the Special Fund of liability (OR p. 268). This exoneration is the only relevant issue on appeal.

The medical evidence of record includes the deposition of Dr. Taulbee, Dr. Parr, Dr. Stevens, the report of Dr. Massie, and the report of the Board appointed physician, Dr. T. R. Miller.

Dr. Taulbee, was the treating physician for plaintiff (OR p. 73, QQ. 18-20) and Dr. Taulbee diagnosed a thoracic spine strain (OR p. 79, Q. 29). Dr. Taulbee felt plaintiff could not perform any type work (OR p. 81, Q. 19). Dr. Taulbee did not allocate responsibility (OR p. 266) or apportion liability. Dr. Taulbee referred plaintiff to Dr. Stevens, Dr. Massie, and Dr. Parr (OR p. 77, QQ. 10-12).

Dr. Stevens diagnosed persistent pain in the upper lumbar spine from undetermined cause or causes (OR p. 179, Q. 21). Dr. Stevens felt plaintiff had asymptomatic spondylolisthesis (OR p. 179, Q. 21). Dr. Stevens did not feel that this condition was associated with plaintiff's complaints of pain (OR p. 181, Q. 29). Dr. Stevens felt plaintiff could return to work (OR p. 180, Q. 21). Dr. Stevens could not explain the cause of pain in plaintiff (OR p. 181, Q. 29). Dr. Stevens gave plaintiff a 5% impairment on the benefit of his doubt as to her injuries (OR p. 182, Q. 32). Dr. Stevens did not allocate responsibility or apportion liability.

Dr. Parr felt plaintiff had a mild strain to the upper back and said she was able to return to work (OR p. 156, QQ. 33-34, PP. 162-163, Q. 18). Dr. Parr would not allow plaintiff any disability (OR p. 157, P. 168). Dr. Parr did not assess or apportion liability against the Special Fund.

Dr. Massie's report was referred to in the deposition of Dr. Taulbee. Dr. Taulbee stated he received a report from Dr. Massie that stated it was not possible to arrive at a definite opinion of the diagnosis (OR p. 77, Q. 13).

The Board appointed physician Dr. T. R. Miller, in his report to the Board (OR p. 91) stated that his orthopedic examination was essentially normal in all respects. Dr. Miller did note a very minimal scoliosis convex to the left, a very slight narrowing with localized lipping at T-8, 9, very minimal arthritic lipping, and possible spondylolisthesis at L-5 (OR p. 92). Dr. Miller did not assign or allocate any disability to these conditions (OR p. 92, #3).

Dr. Miller felt there was no prior active disability existing prior to November 6, 1973 (OR p. 92, #1), and Dr. Miller felt there was no excess disability from a combination of injuries (OR p. 92, #6). Dr. Miller also felt there was no evidence of permanent or other disability resulting from the alleged injury of November 6, 1973 (OR p. 92, #4). In answering question number five propounded by the Workmen's Compensation Board regarding total present disability, Dr. Miller stated that at the time of his examination, there was no objective evidence of orthopedic disability (OR p. 92, #5). This was the only question propounded by the Workmen's Compensation Board where Dr. Miller used the word orthopedic as his response (OR p. 92). It should be noted that the same report of Dr. Miller does contain a history of the subjective complaints of plaintiff recorded by Dr. Miller (OR p. 91).

ARGUMENT

THE OPINION AND AWARD OF THE WORKMEN'S COMPENSATION BOARD OF JULY 28, 1975 AND THE FINAL JUDGMENT OF THE LEE CIRCUIT COURT OF OCTOBER 21, 1975, AFFIRMING THE BOARD'S FINDING THAT FLORENCE IRENE CREECH BECAME 100% OCCUPATIONALLY DISABLED SOLELY DUE TO INJURY WAS FULLY SUBSTANTIATED BY THE EVIDENCE OF RECORD AND IN ACCORDANCE WITH THE STATUTORY AND RULING CASE LAW OF KENTUCKY.

It is a well established principle of Workmen's Compensation law that judicial review of the finding of fact by the Workmen's Compensation Board is specifically limited to determining whether there is any evidence to support that finding, *Hendrick* v. *Kentucky and Virginia Leaf Tobacco Company,* Ky., 229 SW 2d 953 (1950); *Smyzer* v. *B. F. Goodrich Chemical,* Ky., 474 SW 2d 367 (1971).

In *Armco Steel Corporation* v. *Vernon Mullins,* et al, Ky., 501 SW 2d 261, (1973), the Court held:

> "The Board is the sole fact finder in Compensation proceedings and the Circuit Court may not substitute its opinion for that of the Board on the weight of the evidence. Factual findings by the Board, based upon substantial evidence, are conclusive and binding by the Court."

In *Hudson* v. *Owens,* Ky., 439 SW 2d 565 (1969) the Court stated:

> "The medical evidence, although relevant and material, must be considered not as determinative but

rather as a part of a totality of circumstances upon which the Board must make the factual determination . . ."

It matters not whether the Court agrees or disagrees with the Board's finding as long as that finding is based on evidence of probative value. When there is conflicting evidence as to facts, the Board's findings will not be disturbed on Appeal. *Thompson* v. *Kentucky Appalachian Industries, Inc.,* Ky., 451 SW 2d 655 (1970).

The Special Fund contends the Board's Opinion and Award and the Judgment of the Lee Circuit Court affirming the Opinion and Award were not arbitrary nor in error but was in conformity with the law. The Board being the sole fact finder made its findings regarding disability by choosing to accept medical testimony in whole or part pursuant to *Republic Steel Corporation* v. *Justice,* Ky., 464 SW 2d 267 (1971), (OR p. 266).

The Board's findings regarding disability were based on reliable, probative, and material evidence of record and was in accordance with the statutory and ruling case law of Kentucky. The report of the Board appointed physician pursuant to KRS 342.121 exonerated the Special Fund of liability (OR p. 92, #1-7).

The employer contends that the question of plaintiff's permanent disability is open to judicial review based on *Whitten* v. *Terry Elkhorn Mining Co.,* Ky., 449 SW 2d 744 (1969). This Court quoted in the *Whitten* case, from a holding in *Ed Hall Drilling Company v. Profitt,* Ky., 424 SW 2d 403 (1968), "That the review provided by KRS 342.121(4) is limited to the question raised by

specific objections and that a perfunctory or general objection is not enough for that purpose."

In the case at bar, the employer's own admission shows that the employer did not file any exceptions or objections to the Board appointed physician report as contrasted to the *Whitten* case.

The employer not only had the opportunity to file exceptions, but more importantly, if the employer had an objection of the Board appointed physician's report, the employer pursuant to KRS 342.121 (4) could have taken the deposition of said physician. KRS 342.121 (4) provides that any party in interest may take the deposition of this type physician to be used as evidence in this case. Therefore, the employer has waived any objection the employer has to the report of the Board appointed physician and the employer did not preserve his point for appeal and it is too late to bring it up now.

While admitting no exceptions were filed in the case at bar, the employer does note that the Board noted that the Board appointed physician had no right to exclude subjective symptoms pursuant to the *Whitten* case. The report of the Board appointed physician does contain subjective complaints (OR p. 91).

The employer also cites *Thompson* v. *General Electric Co.*, Ky., 461 SW 2d 84 (1970), in support of his contension that the issue of plaintiff's permanent disability is still open for review. The *Thompson* case also requires that exceptions or objections be filed by the party disagreeing with the Board appointed physician's report. Here again, the employer not only had the opportunity

to file exceptions or objections, but more importantly the employer did not take the deposition of the Board appointed physician as provided for by statute. Therefore, again the employer has waived any objection to the report of the Board appointed physician, and the employer has not preserved this point for appeal as it is too late to bring it up now. Also, the *Thompson* case cited by the employer involved disagreement between two disinterested physicians appointed by the Board. There is only one disinterested physician that was appointed by the Board in the case at bar. The employer contends that the rule regarding disinterested physicians should be broadened to include other physicians as distinguished from the treating physician. The Special Fund contends the best and only way to have the disinterested physician in a case is for the physician to be appointed by someone not a party of interest regarding the outcome of a case. KRS 342.121 provides this type physician. Furthermore, the physician that the employer contends should be disinterested appears to be Dr. David Stevens. In the case at bar, the testimony of Dr. David Stevens was considered by the Board (OR p. 267). The liability of the Special Fund is set out in KRS 342.120 and the Special Fund does not bear any liability with regard to the testimony of Dr. Stevens or otherwise in the case at bar.

It is the Special Fund's contention based on the totality of the circumstances surrounding the incident in question, the somewhat divergent medical opinions of record and the Board's discretionary fact finding powers, the Board's Opinion and Award was not in error but in conformity with the law.

Since the Board finding of fact was clearly substantiated by the evidence of record it was right and proper for the Lee Circuit Court to affirm the Board's Opinion and Award. See *Pittsburg and Midway Coal Mining Company, et al* v. *Rushing,* Ky., 456 SW 2d 816 (1969).

CONCLUSION

The Opinion and Award of the Workmen's Compensation Board of July 28, 1975 and the Judgment of the Lee Circuit Court of October 21, 1975, should both be affirmed in their entirety.

Respectfully submitted,

RONALD C. BAKUS
Assistant Counsel
Department of Labor
310 Legal Arts Building
200 South Seventh Street
Louisville, Kentucky 40202

KENNETH E. HOLLIS
GENERAL COUNSEL
Department of Labor
Frankfort, Kentucky 40601

ATTORNEYS FOR SPECIAL FUND